

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 98-472

September 28, 1998

HARRY J. HOPCROFT, JR., ET AL VS
BELL ATLANTIC-MAINE, Request for
Commission Investigation on a 10-Person
Complaint Against "Intercept/Call-Back"
Service

ORDER DISMISSING
COMPLAINT

WELCH, Chairman; NUGENT, Commissioner

I. SUMMARY

In this Order, we find the complaint is without merit and therefore dismiss it.

II. BACKGROUND

On June 19, 1998, the Commission received a complaint against Bell Atlantic-Maine (BA-ME) signed by Harry J. Hopcroft, Jr., and 9 other persons. The complaint, filed pursuant to 35-A M.R.S.A. § 1302, requests that the Commission investigate BA-ME's practice of offering a PhoneSmart service called Enhanced Repeat Dialing. When activated by the calling party, Repeat Dialing checks a busy called party's line for 30 minutes and causes the calling party's phone to ring when the called party's line is no longer busy. The calling party is charged a fee for each time it activates the service. The complainants do not object to the Repeat Dialing service, but rather to Enhanced Repeat Dialing, a new feature whereby BA-ME offers the service via an overlaid prerecorded announcement which is triggered when a caller would receive a busy signal. The complainants believe that they should be given the option of preventing BA-ME from broadcasting its message to persons attempting to call them. Specifically, they state that, "[w]e do not want people being subjected, without their permission, to the overlaid announcement when they call our telephones."

Pursuant to 35-A M.R.S.A. § 1302, the Commission notified BA-ME of the complaint on June 19, 1998, and ordered it to file its response to the complaint within 10 days. On June 29, 1998, BA-ME filed its Response to the 10-person complaint.

In its Response, BA-ME stated that it had tariffed Repeat Dialing and began advising customers of the availability and uses of Enhanced Repeat Dialing beginning with its March 1998 bills. BA-ME stated that the recorded message advises customers of the latest changes to the Repeat Dialing service which now make it possible for customers to activate the service upon hearing the

busy signal without hanging the telephone up and dialing *66, which is the conventional method for activating the service.

More significantly, BA-ME noted that the prerecorded message is a service to the **calling** party, not the called party. BA-ME subscribers who do not want to hear the message if the line they are calling is busy may direct BA-ME to "deactivate the recorded message, either on a per call or a per line basis." (This information was distributed to customers beginning in March 1998.)

The Office of the Public Advocate (OPA) filed comments on July 14, 1998, in support of the complainants' position and raised other concerns relating to the service. Specifically, the OPA argued that offering the service in lieu of the busy signal may constitute an invasion of privacy. Further, the OPA expressed concerns with using the network to advertise a BA-ME service when competitors could not do the same. Finally, OPA stated that the Commission could not dismiss the complaint as without merit due to the standard set in Agro v. Public Utilities Commission, 611 A.2d 566 (Me. 1992).

On July 24, 1998, BA-ME replied to the OPA's comments by taking issue with the OPA's substantive comments and clarifying the background of its position in this case. On August 3, 1998, the OPA replied to BA-ME's reply by arguing that the substance of BA-ME's reply was inaccurate, and further clarifying the positions outlined in its July 13, 1998 comments.

On August 13, 1998, Commission staff arranged for a conference call to clarify several issues. Staff, the lead complainant, BA-ME and OPA participated in the call. The call clarified that Enhanced Repeat Dialing is available only on lines in exchanges served by a Nortel DMS100 switch¹ and its remote switches, that it is not available on Centrex lines or lines in hunt groups, and that a competitive local exchange carrier (CLEC) could resell or obtain an unbranded version of Enhanced Repeat Dialing through either resale or the purchase of unbundled network elements. Further, BA-ME indicated that when the service is activated on a toll call, the customer's presubscribed toll carrier (not necessarily BA-ME) carries the call.

¹ The Brunswick, Bath, Sanford and North Deering wire centers and their tributaries are served by Nortel DMS hosts and remote switches. BA-ME said it is in discussions with Lucent (another switch manufacturer) and may be able to offer the service in all its Maine exchanges.

III. ANALYSIS

We find that because the network feature in question serves to advise BA-ME customers calling persons who are already on the phone of service availability and can be permanently deactivated by such customers upon request to BA-ME, the service is not unreasonable. Therefore the complaint is without merit and there is no basis for conducting a formal investigation in this matter. The network feature is only offered to the call originating party -- it is not a feature associated with the called party's line or service. Thus, we agree with BA-ME that it would not be logical (or even possible) to allow the terminating customer to determine which services another subscriber is advised of by BA-ME. If parties attempting to contact the complainants do not wish to receive the Repeat Dialing message from BA-ME, those parties may contact BA-ME and have the message removed from their lines.

With regard to the issues raised by the OPA, we first find that the facts of this case do not give rise to any privacy interest the called party might have in "what calling-parties hear when their number is dialed." As BA-ME has already pointed out, called parties have never had a privacy interest in whether a calling party hears a ring or busy signal when their line is called. In this case, before the calling party hears the BA-ME message it hears a busy signal. Thus, the calling party already knows that the called party is taking another call at that time. The called party's "right to privacy" is not violated by the broadcast of the message.

With regard to the OPA's concerns regarding unfair competition and use of the network for advertising, we find the OPA's key factual assertion regarding use of the network by other competitors is incorrect. As BA-ME stated during the teleconference, a competitor would be able to advertise its services in a similar fashion. Thus, because this service could be offered by a CLEC through either resale or the purchase of elements, our concerns regarding possible anti-competitive effects have been allayed.

Finally, with regard to the OPA's legal arguments on the applicability of the Agro standard to this case, we find that the OPA has misread Agro. The OPA appears to be arguing that the Commission must investigate a complaint if it has jurisdiction over the matter raised in the complaint, even if it is clear from the face of the complaint that it lacks merit, i.e., that the rates, tolls, or services are not unreasonable, insufficient, unjustly discriminatory or inadequate. The OPA's interpretation of Agro cannot be squared with the plain meaning of the statute or the actual language from Agro. If the Commission determines, upon review of a 10-person complaint (which may include formal or

informal discovery), that the practice complained of is not unreasonable, insufficient, unjustly discriminatory, or inadequate, the Commission is not obligated to investigate fully but, in fact, is obligated to dismiss the matter as without merit.

Thus, we reject the OPA's interpretation of Agro and find, after review of the relevant facts, that Enhanced Repeat Dialing is not unreasonable and

O R D E R

that the complaint be dismissed as without merit.

Dated at Augusta, Maine this 28th day of September, 1998.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: WELCH
NUGENT